NO. 2720.

United States
Circuit Court of Appeals
For the Ninth Circuit

ALASKA SALMON COMPANY, a Corporation,
Plaintiff in Error and Appellant,

vs.

THE TERRITORY OF ALASKA,
Defendant in Error and Appellee.

UPON WRIT OF ERROR TO AND UPON APPEAL FROM THE UNITED STATES DISTRICT COURT OF THE DISTRICT OF ALASKA, DIVISION NUMBER ONE

Brief of the Defendant in Error and Appellee

J. H. COBB,
Chief Counsel

ALASKA DAILY EMPIRE PRESS

NO. 2720.

United States
Circuit Court of Appeals
For the Ninth Circuit

ALASKA SALMON COMPANY, a Corporation,
Plaintiff in Error and Appellant,

vs.

THE TERRITORY OF ALASKA,
Defendant in Error and Appellee.

UPON WRIT OF ERROR TO AND UPON APPEAL FROM THE UNITED STATES DISTRICT COURT OF THE DISTRICT OF ALASKA, DIVISION NUMBER ONE

Brief of the Defendant in Error and Appellee

J. H. COBB,
Chief Counsel

ALASKA DAILY EMPIRE PRESS

STATEMENT OF THE CASE.

This is an agreed case under the provisions of Chapter 28 of the Alaska Code of Civil Procedure, providing for the submission of a controversy to the decision of the Court without action.

The facts agreed upon, in brief, show that during the years 1913, 1914 and 1915, the Alaska Salmon Company (hereinafter mentioned as Defendant was engaged in the business of fishing for and canning salmon in the Territory of Alaska; that under the Territorial revenue laws of Alaska of 1913-1915, it was due the Territory of Alaska the sums of money mentioned in the judgment in its favor, unless either the said laws were invalid, or the fishing industry was not subject to taxation by the Territory, Specifically stated, the questions of law submitted to the Court, and which are the only ones before this Court for review, are stated as follows:

1. Whether or not defendant, having complied with all the conditions and paid the license fees imposed by the said acts of Congress, is obliged to apply for a license and pay the license fees and taxes imposed by the said Act of the Legislature of Alaska, designed (designated) as House Bill No. 109, approved May 1, 1913.

2. Whether or not defendant, having complied with all the conditions and paid the license fees imposed by the said acts of Congress, is obliged to apply

for a license and pay the license fees and taxes imposed by the act of the Legislature of Alaska, known as House Bill No. 109, approved April 29, 1915. (Record Page 68).

The acts of Congress referred to are the act of June 26, 1906, which is printed in the Record Pages 46 to 54, and the act of March 3, 1899, printed in the Record Pages 54 to 57. The part of these acts material to the question to be considered, is found in Section 1 of the act of June 26, 1906, (Record Page 46), which provides that every person, company or corporation carrying on the business of canning, curing or preserving fish, or manufacturing fish products, within the Territory of Alaska, shall, in lieu of all other license fees and taxes therefor and thereon, pay license taxes on their said business and output as follows:—then follows certain specified taxes which are paid to the Federal Government.

By act of Congress of August 24, 1912, Alaska was given a legislature with certain specified powers. This act is printed in the Record Pages 22 to 38, inclusive. In Section 9 of said Act (Record Page 27) the legislative power is defined as follows: "The legislative power of the Territory shall extend to all rightful subjects of legislation but not inconsistent with the Constitution and laws of the United States," etc. Then follows certain limitations which, so far as the question herein involved is concerned, are the following: "All taxes shall be uniform upon the same class of subjects, and shall be levied and

collected under general laws, and the assessments shall be according to the actual value thereof. No tax shall be levied for Territorial purposes in excess of one percentum upon the assessed valuation of property therein in any one year."

In Section 3 (Record Page 23) it is provided that the Constitution of the United States and all the laws thereof which are not locally imapplicable, shall have the same force and effect within the said Territory as elsewhere in the United States; that all the laws of the United States heretofore passed establishing the executive and judicial departments in Alaska, shall continue in full force and effect until amended or repealed by Act of Congress; that except as herein provided, all laws now in force in Alaska shall continue in full force and effect until altered, amended or repealed by Congress or by the Legislature; "Provided, That the authority herein granted to the Legislature to alter, amend, modify and repeal laws in force in Alaska shall not extend * * * * * * to the game, fish and fur-seal laws, and laws relating to fur-bearing animals of the United States applicable to Alaska, or to the laws of the United States providing for taxes on business and trade * * * * * *Provided further, that this provision shall not operate to prevent the legislature from imposing other and additional taxes and licenses." (Italics ours.)

These are believed to be all the statutory laws

bearing upon the questions here at issue, enacted by Congress.

The first Legislature of Alaska, passed an act approved May 1st, 1913, (which is found in the Record, Pages 59-64) which among other things provide:

"Section 1. That any person or persons, corporation or company prosecuting or attempting to prosecute any of the following lines of business within the Territory of Alaska, shall first apply for and obtain license so to do from the District Court, or sub-division thereof in said Territory, and pay for said license for the respective lines of business and trades, as follows, to-wit: * * *

Fisheries: Salmon canneries, seven cents per case on sock eye and king salmon; one-half cent a case on humpback, cohoe or chum salmon."

The second Legisalture passed an act amendatory of the last Act, approved April 29, 1915, which is found in the Record, Pages 38-46) which, among other things, provide:

"Section 1. That any person, firm or corporation prosecuting or attempting to prosecute any of the following lines of business in the Territory of Alaska, shall apply for and obtain a license and pay for said license for the respective lines of business, as follows: * * *

"6th. Fisheries: Salmon canneries, four cents per case on King and Reds or Sockeye; two cents

per case on Medium Reds; one cent per case on all others. * * *

"9th. Gill Nets: One dollar per hundred fathoms or fraction thereof."

Section 3, Page 44 provides, among other things: "It shall be the duty of the Attorney General, or other authorized legal counsel of the Territory, to enforce the provisions of this Act;"

"Section 4: Special remedies provided by this Act, or other Acts of the Legislature, shall not be deemed exclusive, and any appropriate remedy, either civil or criminal or both, may be invoked by the Territory in the collection of all taxes, and in civil actions the same penalties may be collected, as are herein provided in criminal actions."

In Section 2 it is provided (Record, Page 43) that "all taxes for the current year shall be calculated for the year beginning January 1, and ending December 31st, 1915."

"Sec. 7: The Act of which this Act is an amendment is hereby repealed, except in so far as the same is hereby re-enacted, but nothing herein contained shall be construed to relieve any person, firm or corporation from the payment of any tax, penalty and interest accrued and owing under the Act of which this Act is an amendment, but all such taxes, penalties and interest shall be paid, or collected and enforced in the same manner as taxes herein provided for are collected and enforced."

The above are all the Territorial statutory pro-

visions bearing upon the questions of law herein at issue. The agreed statement shows (Record, Page 58) that if the Act of 1915 is valid, that a judgment for taxes should be entered in favor of the Territory and against the plaintiff for $1158.28, the tax on the canned salmon, and $131.75 for taxes on gill nets. And if the Act of 1913 is held valid, that the Territory was entitled to judgment for taxes due for the years 1913 and 1914 of $4643.60 (Record, Page 65.)

ARGUMENT

The trial court answered the questions submitted to it in the agreed statement, as follows: "That compliance with all the conditions, and the payment of the license fees imposed by the Act of Congress, set forth in the agreed statement, does not relieve the defendant from the payment of the license taxes imposed by the Act of the Alaska Legislature, approved May 1, 1913; but that the defendant was obliged to apply for a license, and pay the license fees and taxes so imposed."

And "that the defendant having complied with all the conditions, and paid the license fees imposed by the Acts of Congress, in said agreed statement set forth, is obliged to apply for a license and pay the license fees and taxes imposed by the Act of the Legislature of Alaska, known as House Bill No. 109, approved April 29, 1915." (Record Pages 73-74), and rendered judgment accordingly.

The defendant contended and requested the court to hold, in substance, as follows:

1. That the Territorial acts, in so far as they imposed a license tax upon fisheries, were within the prohibition contained in Section 3 of the Organic Act against altering, modifying or repealing the fishing laws, or the laws of the United States, providing for taxes on business and trade in Alaska.

2. That said acts of the Territorial Legislature were void, because no assessment whatsoever was made upon the property of the defendant; and,

3. That the Act of May 1, 1913, under which the taxes for 1913 and 1914, were sought to be collected, did not provide for any civil liability. (Record Pages 71-72.) (The court was also asked in the agreed statement, to pass upon the effect, if any, that the release of salmon fry would have as a satisfaction or otherwise of the Territorial tax. But inasmuch as there were no facts whatsoever in the agreed statement pertaining to this matter, the court ignored the request as a mere moot question, and no further attention will be paid to that question in this brief.)

The assignment of errors (Record Pages 6-7) present the questions raised for the consideration of this Court, and while there are nine assignments, they all relate to one or the other points stated.

We believe we can be of more assistance to the Court by presenting our views upon the questions at issue directly, without attempting to follow or

specifically answer the argument of the plaintiff in error and appellant. We wish to say at the outset of the argument, that if, for any reason, whether assigned or not, the Territory of Alaska is without power to tax the fishing industries, or is without power to lay a license tax, the people of Alaska ought to know it, and the Court ought to decide that question. For it is reasonably certain, because of the condition of the Territory, which will hereinafter be adverted to, that the system of taxation adopted by the Legislature in the Acts of 1913 and 1915, herein involved, will be continued unless the Legislature is without the power to collect taxes by means of licenses. And it is reasonably certain that unless the Legislature is without power to tax fishing industries in Alaska, that industry will be made to pay its fair share of the expenses of the Territorial Government. Consequently, the sooner the said questions are finally and authoratively settled, the better it will be for all persons concerned.

Taking up the questions presented in the order above stated, we will deal first with the question:

DOES THE THIRD SECTION OF THE ORGANIC ACT, PROHIBITING THE ALASKA LEGISLATURE FROM REPEALING, AMENDING OR MODIFYING THE FISHING LAWS OF THE UNITED STATES PURTAINING TO ALASKA, AND THE LAWS OF THE UNITED STATES PROVIDING FOR A LICENSE TAX ON BUSINESS, PREVENT THE LEGIS-

LATURE OF ALASKA FROM LEVYING A TERRITORIAL LICENSE TAX ON BUSINESS IN ALASKA FOR TERRITORIAL PURPOSES?

The contention of the defendant is that the proviso contained in Section 3, namely: "Provided, further, that this provision shall not operate to prevent the Legislature from imposing other and additional taxes and licenses," means merely that the Legislature is not prohibited from imposing other and additional licenses and taxes on other kinds of industry and other kinds of business and trades than the fisheries; that the Act of June 26, 1906, which makes the taxes levied by the Act of Congress upon the fishing industry to be in lieu of all other licenses and taxes whatsoever, is itself a prohibition to the Legislature from laying the license taxes on the fisheries. But the Organic Act is the latest expression of the Legislative, and if there is any conflict between any part of the Act of 1906 and the Organic Act, then the former is to that extent repealed. The proviso contained in Section 3 is clear, unambiguous, and needs no construction. Its meaning is on its face too plain for argument, namely: That in imposing other and additional license or taxes, the Legislature of Alaska was not to be fettered by anything contained in the Act of 1906, or other acts of Congress. And where the language is plain and unambiguous, it would seem that there was no room for construction, and this ought to be decisive of the question.

However, a consideration of the matter in the light of general conditions, and in the light of the debates in Congress at the time the Organic Act was passed, leads to the same conclusion, even if it be conceded that there is any ambiguity in the statutory law itself.

When the first Alaska Legislature met, one of the most serious problems confronting it was the question of revenue. The population of Alaska is almost entirely centered in incorporated towns. More than 90 per cent. of the permanent white inhabitants of the Territory reside in these towns and more than 99 per cent. of the taxable property of the Territory, excluding fishing and mining, is within the incorporated towns. These towns are already burdened with the support of a municipal government. The population is very scattered, in many cases hundreds of miles intervening between one town and another, and it was found that a general property tax would cost at least half of the amount laid to cover the expenses of assessment, equalization and collection, and it was further found that such a tax would bear with a special weight upon the inhabitants of the towns already burdened with the expenses of municipal government. But the people of Alaska were familiar with the system of license taxes imposed by Congress, and in force for some fourteen or fifteen years, and it was found that the expenses of the collection of this tax were comparatively small and that its burden rested upon

those industries best able to bear it. It was further found that if a general property tax was laid upon the property in the Territory, the mining and canning industries, which lie outside of incorporated towns, would pay as much, if not more, taxes, than they would pay under a license system, but the Territory would by no means get the entire benefit of it owing to the enormous cost of collection due to conditions in the Territory.

The salmon cannning industry prior to the year 1915 was the largest single industry in the Territory of Alaska. Its product for the year 1914 was between nineteen and twenty millions. This product consisted of taking and canning the food fish, public property of the Territory, and the tax sought would seem to be only a very small consideration for the privilege of being allowed to take and sell and apply to their own use the proceeds of this public property, or common property, belonging to the people of the Territory. Now, it is obvious that if this industry, the largest in the Territory, cannot be taxed, the necessary revenue for the expenses of the Territorial Government will have to be collected from other people or other kinds of business, and their taxes must necessarily be increased to the precise extent and amount by which the fishing industry is exempted. The law indulges in no presumption in favor of special privileges, or special exemptions. When such privilege or exemption is claimed, the

right to it should be supported by a clear and unambiguous enactment.

The Organic Act of the Territory of Alaska was debated in the lower house of Congress on the 24th day of April, 1912. As the Bill then stood, there was nothing in Section 3 concerning the game or the fish, but the authority granted to the Legislature to alter, amend or repeal laws in force in Alaska was simply not extended to the customs, internal revenue, postal or other general laws of the United States. An amendment was offered by Mr. Willis, as follows: To insert after the word "States"—"or to the game laws of the United States applicable to Alaska." Mr. Mann suggested adding "fish" and the amendment was accepted by Mr. Willis.

In the course of the debate, it seems to have been conceded by the members participating therein, that these words did not deprive the Legislature of the power of passing other laws relating to fisheries not in conflict with the laws passed by Congress, and upon that concession being made, the Delegate from Alaska withdrew his objection to the amendment. (See Vol. 48, Part 6, Page 5288, Congressional Record, 62nd Congress, Second Session). The bill passed the House in this form, and was sent to the Senate. When it reached that body, it was amended by the addition of this provision: "Provided, further, that this provision shall not operate to prevent the Legislature from imposing other and additional taxes and licenses." When the bill was

sent back to the House, it refused to agree to this and several other amendments, and was sent to conference; and the Committee on Conference in the House recommended that the House recede from its disagreement to this Senate amendment, which was done, and the Senate proviso was added to the bill. (Congressional Record, August 20, 1912.)

It is clear, from the consideration of the above, that there is not on the face of the bill an expression of any such purpose to exempt the fishing industry of the Territory from taxation. And it is further clear that there was not in the minds of the legislators when the bill was passed any such purpose as is contended for by the defendants; but that it was in their minds that the Legislature should have the power to levy taxes and licenses for Territorial purposes in addition to the taxes then being imposed by Congress.

DOES THE FACT THAT NO ASSESSMENT WAS MADE ON THE PROPERTY OF THE DEFENDANTS RENDER THE TAX VOID?

The defendant contends that it does, and seeks to find a justification or support for the contention in the provision in Section 9. But the provision in Section 9 manifestly relates only to the property tax of one per cent., and has no application whatever to license taxes. The exact wording of the provision relied upon is as follows: "All taxes shall be uniform upon the same class of subjects, and shall be levied and collected under general laws, and the

assessments shall be according to the actual value therof. No tax shall be levied for Territorial purposes in excess of one per centum upon the assessed valuation of property therein in any one year."

This sort of requirement applies exclusively to direct property taxes, and does not apply to license taxes.

25 Cyc., 605-6.

And again: "The constitutions of many of the states contain the requirement that taxation shall be equal and uniform, that all property in the State shall be taxed in proportion to its value, that all taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, or that the legislature shall provide for an equal and uniform rate of assessment and taxation; and in the face of such provisions, a tax law which violates the prescribed rule of equality and uniformity is invalid, although there is sufficient difference in the wording of the different provisions to account for some lack of uniformity in the decisions as to what constitutes a violation of their requirements. The requirement does not apply to every species of taxation, and does not restrict the legislature to the levying of taxes upon property alone. The restriction relates only to the rate or amount of taxation and its incidence upon taxable persons and property, and does

not limit the legislature in regulating the mode of levying and collecting the taxes imposed, and it also relates only to property within the state, and neither the statutes of another state nor the action of its taxing officers can affect the question. In the absence of such a constitutional requirement, it is not essential to the validity of taxation that it shall be equal and uniform, and in such case a tax law cannot be declared unconstitutional merely because it operates unequally, injustly or oppressively.

The requirement of equality and uniformity applies only to taxes in the proper sense of the word, levied with the object of raising revenue for general purposes, and not to such as are of an extraordinary and exceptional kind, or to local assessments for improvements levied upon property specially benefitted thereby, or to other burdens, charges, or impositions which are not properly speaking taxes; and, further, such a constitutional provision is to be restricted to taxes on property, as distinguished from such as are levied on occupations, business, or franchises, and on inheritances and successions, and as distinguished also from exactions imposed in the exercise of the police power rather than that of taxation.

The principle of equality and uniformity does not require the equal taxation of all occupations or pursuits, nor prevent the legislature from

taxing some kinds of business while leaving others exempt, or from classifying the various forms of business, but only that the burdens of taxation shall be imposed equally upon all persons pursuing the same avocation, or that if those following the same calling are divided into classes for the purpose of taxation, the basis of classification shall be reasonable and founded on a real distinction, and not merely arbitrary or capricious. To this extent, also, and no further, the principle applies to license fees or taxes imposed under the police power, or for the better regulation of occupation supposed to have an important public aspect."

(37 Cyc. p. 729-33.)

The tax in question levied by the Legislature of Alaska is of the same kind or nature as the tax levied by the Congress of the United States, and which had been in force in Alaska since 1898. The validity of this tax came before the Supreme Court of the United States, in the case of Binne vs. United States (194 U. S. 486) and in the course of the opinion the Court said:

"We shall assume that the purpose of the license fees required by Section 460 is the collection of revenue and that the license fees are excises within the constitutional sense of the term. Nevertheless, we are of the opinion that they are to be regarded as local taxes imposed for the purpose of raising funds to support the

administration of local government in Alaska.

"It must be remembered that Congress, in the government of the Territories as well as of the District of Columbia, has plenary power, save as controlled by the provisions of the Constitution, that the form of government it shall establish is not prescribed, and may not necessarily be the same in all the Territories. We are accustomed to that generally adopted for the Territories, of a quasi state government, with executive, legislative and judicial officers, and a legislature endowed with the power of local taxation and local expenditures, but Congress is not limited to this form. In the District of Columbia it has adopted a different mode of government, and in Alaska still another. It may legislate directly in respect to the local affairs of a Territory, or transfer the power of such legislation to a legislature elected by the citizens of the Territory. It has provided in the District of Columbia for a board of three commissioners, who are the controlling officers of the District. It may entrust to them a large volume of legislative power, or it may by direct legislation create the whole body of statutory law applicable thereto. For Alaska, Congress has established a government of a different form. It has provided no legislative body but only executive and judicial officers. It has enacted a penal and civil code. Having created no

> legislative body and provided for no local legislation in respect to the matter of revenue, it has established a revenue system of its own, applicable alone to that Territory. Instead of raising revenue by direct taxation upon property, it has, as it may rightfully do, provided for that revenue by means of license taxes."

The license tax levied by Congress was sustained in that case, as not in contravention of that clause of the Constitution of the United States which provides that "all duties, imposts and excises shall be uniform throughout the United States." And the decision was rested mainly upon the ground that Congress, in passing the license tax laws in question, was acting as the Legislature of Alaska, and not in its capacity as the national legislature. Now, if Congress had the power under the Constitution of the United States to lay such a tax, it had the power to delegate it to the Alaska Legislature and it has delegated to the Alaska Legislature power to legislate over "all rightful subjects of legislation" except as in the Organic Act otherwise provided. The Organic Act does contain more restrictions upon the power of the Territorial Legislature than were ever inserted in the Organic Act of any other Territory. But, nevertheless, Congress did give it power to lay license taxes and a property tax not to exceed one per centum of the assessed valuation.

The argument then simply comes down to this: Is the laying of license tax a "rightful subject of

legislation?" That it is, will hardly be disputed.

Does the act laying these license taxes violate any provision of the Constitution of the United States? This is answered in the negative by the Binns case cited above.

Is such legislation forbidden by the Organic Act?

The contention under this head is:

1. That it is forbidden by Section 3 of the Organic Act, which prohibits the Legislature from interferring with the fish and game laws, or the laws providing for a tax on business. But the argument is completely negatived by the further proviso: "That this provision shall not operate to prevent the Legislature from imposing other and additional taxes and licenses."

2. That such legislation is forbidden in the Ninth Section of the Organic Act, which requires that "all taxes shall be uniform upon the same class of subjects, and shall be levied and collected under general laws, and the assessment shall be according to the actual value thereof. No tax shall be levied for Territorial purposes in excess of one per centum upon the assessed valuation of property therein in any one year." But this provision relates only to property taxes, and has no bearing whatever upon the system of license taxation.

3. It is contended that the acts in question are in contravention of that portion of the Act of Congress of June 26, 1906, providing that the taxes up-

on fishing industry therein laid shall be "in lieu of all other license fees and taxes therefor and thereon." There are two complete answers to this contention. In the first place, when the Act of 1906 was passed, there was no Territorial Legislature for Alaska, and the clause quoted had no application to something then not in existence; and, second, Congress having in 1912 delegated the power to levy other and additional license fees and taxes, that later expression of the legislative will repealed the above clause in the Act of June 26, 1906.

In conclusion, we respectfully submit that the revenue acts passed by the Alaska Legislature in 1913 and 1915, are in all respects valid, and that the judgment of the District Court should be affirmed.

Respectfully submitted,

J. H. COBB,

Chief Counsel of the Territory of Alaska.